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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1949

No. 792

HENRY C. GLISSMANN,

Appellant,

vs.

THE CITY OF OMAHA, ET AL.

APPEAL FROM THE SUPREME COURT OF THE STATE OF NEBRASKA

STATEMENT OPPOSING JURISDICTION AND MOTION TO DISMISS OR AFFIRM

EDWARD F. FOGARTY,
EDWARD SKLENICKA,
JAMES M. PAXSON,
HERBERT FITLE,
Counsel for Appellee, City of Omaha;
ALFRED G. ELLICK,
Counsel for Intervening-Appellees.

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IN THE SUPREME COURT OF NEBRASKA

General No. 32640

THE CITY OF OMAHA, A MUNICIPAL CORPORATION,
Appellee;

NINETIETH STREET REALTY COMPANY, A CORPORATION, AND WEST HILLS IMPROVEMENT CLUB, A CORPORATION,
Interveners-Appellees,

vs.

HENRY C. GLISSMANN,
Appellant

STATEMENT OPPOSING JURISDICTION OF THE SUPREME COURT OF THE UNITED STATES

Motion to Dismiss or Affirm

This Statement and Motion is filed pursuant to Rule 12, Section 3, of the Rules of the Supreme Court of the United States which permits the appellee, within 15 days after the service prescribed by Section 2 of Rule 12, to file a typewritten statement disclosing any matter or ground making against the jurisdiction of the Supreme Court asserted by the appellant and to include therein a motion to dismiss or affirm.

Statement of Facts

On December 30, 1947, the city council of the City of Omaha, Nebraska, duly enacted and passed Ordinance No. 15833 which amended the regular zone ordinance of said

City by changing from the 2nd Suburban District to the 1st Residential District three large tracts of land, totaling over 500 acres, located west of the city limits. A copy of Ordinance No. 15833 is attached hereto and marked Exhibit A. The appellant, Henry C. Glissmann, was at that time a leasee under a 20 year lease of a part of the lands changed by the new ordinance. His leased ground was used principally for a golf course, but about 14 acres were vacant. It is upon these 14 acres that he desires to operate a trailer camp. The evidence is undisputed that trailer camps were permitted in this area prior to the passage of Ordinance No. 15833 but were prohibited thereafter.

Shortly after the passage of Ordinance No. 15833 the appellant proceeded to construct a trailer camp on a part of the 14 acre tract. On April 13, 1948, the City of Omaha commenced a suit in the District Court of Douglas County, Nebraska, to enjoin such construction on the ground that the appellant was violating the zone ordinance of the City, as amended by Ordinance No. 15833. Immediately thereafter the West Hills Improvement Club, a corporation, and the Ninetieth Street Realty Company, a corporation, being property owners in the vicinity of the proposed trailer camp, intervened on behalf of the City. In his answer appellant asserted that he had a right to proceed with the construction of his trailer camp for the reason that he had a "vested right" or non-conforming use because (1) trailer parks were permitted when he entered into his lease and (2) he had conceived the idea of a trailer park and had expended some money for plans and materials before Ordinance No. 15833 was adopted. This issue was stated by the appellant in his answer as follows:

> "This answering defendant admits that he intends to go ahead with the construction, maintenance and operation of said trailer park for the reason that said ordinance is not retroactive, and does not apply

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> to the property leased by him, for the reason that he had a vested right to erect, construct and maintain a trailer park as authorized by the Ordinance, when he entered into the lease, and for the City Council to attempt, after he acquired said vested right to deprive him of the right to operate, construct and maintain said trailer park, would be in violation of the Constitution of the State of Nebraska and of the United States, prohibiting the state or any political subdivision thereof from depriving him of his property, without just compensation and would be unconstitutional."

The case went to trial (no jury) on these pleadings. At the close of the *City's* case the appellant asked and received permission from the trial court to amend his answer by adding the following clause to paragraph 7 thereof:

> "That said amended ordinance is in violation of the defendant's rights in that it has no relation to the police power of the City, nor public safety, nor public morals, and is therefore unconstitutional as depriving this defendant of his property without just compensation."

On January 26, 1949, the trial court entered a decree in favor of the City and against the defendant, finding that the zone ordinance did not deprive the defendant of any vested rights and was not unconstitutional. The decree enjoined the defendant from constructing or operating a trailer camp. The appellant then posted a supersedeas bond and appealed to the Supreme Court of Nebraska. On December 6, 1949, that court affirmed the decision of the court below. Appellant's motion for a rehearing was overruled on February 4, 1950.

The Supreme Court of Nebraska in its opinion (151 Neb. 895, 39 N. W. 2d 828) considered two main problems. First, whether under the facts of the case and the laws of Nebraska defendant (appellant) had a vested right or nonconforming

use because he had leased the ground and conceived the idea of building a trailer camp prior to the adoption of Ordinance No. 15833. The court stated this issue as follows:

> "Appellant's primary contention is that under these facts and circumstances he had established a nonconforming use of these premises as a trailer camp or park prior to the amendment by the city of its zoning ordinances relating thereto and that such right, being vested, the city could not deprive him thereof."

The court answered this contention in this manner:

> "We have come to the conclusion that if, after a purchase or leasing thereof, a permit is obtained to use lands for a use then permissible under the zoning ordinances and either substantial construction is made thereon or substantial liabilities are incurred relating directly thereto, or both, before the permit is canceled or revoked then the right to such use has become established and vests as a permissive nonconforming use which cannot be affected by a subsequent change. See Trans-Oceanic Oil Corp. v. City of Santa Barbara, supra.
>
> "We find appellant's contention in this respect is not well taken for under the facts and circumstances of this case, as hereinbefore fully set out, the appellant had not established any vested right to use these premises for the purpose here contended when the change was made. Consequently, we find that the ordinance passed on December 30, 1948, which eliminated the use of the premises for that purpose, lawfully extinguished his permit and any rights he may have had thereunder."

The second question involved the constitutionality of Ordinance No. 15833. The court first announced the rule that an ordinance passed by a city in the exercise of its police power is presumably valid and the courts will not interfere with its enforcement until the reasonableness or

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want of necessity of such measure is made to appear by satisfactory evidence. The court then concluded:

> "The question of the validity or invalidity of a zoning ordinance presents a question to be determined on examination of the facts presented in each particular case. The evidence here shows, with reference to the tracts herein involved, that the commercial development along Dodge Road is a considerable distance to the south and east; that the immediate area to the east, southeast, and south is the golf course operated by the appellant; that to the southwest, west, northwest, and northeast are residential areas and to the north are some gardens. There appears to be no commercial development in this immediate area. In fact, the entire neighborhood is zoned as residential. Under these facts we do not think the city council acted arbitrarily or unreasonably in the passing of this ordinance. We find that in so doing it properly exercised the police powers granted to it, and that the ordinance is valid and should be enforced. In view thereof, we find the decree of the trial court to be correct and the same is therefore affirmed."

Three justices dissented on the ground that "the ordinance unreasonably interferes with the property rights of the appellant and is void insofar as it applies to the property in question." It is to be noted, however, that the dissenting justices did not designate which Constitution (*i. e.*, federal or state) they believed was violated.

On March 24, 1950, an Order Allowing Appeal was signed by the Chief Justice of the Supreme Court of Nebraska and on March 28, 1950, the appellees were served with certain papers purporting to be those required by Rule 12, Section 2.

Under these facts appellees contend that the appeal should be dismissed for the reasons that (1) the record does not present for decision any substantial federal ques-

tion, and (2) the jurisdictional statement filed by the appellant does not meet the requirements of Rule 12, Section 1, of the Rules of the Supreme Court.

Argument

I

Appellees contend that the record of this case does not present for decision any substantial federal question and that, therefore, the appeal should either be dismissed or the decision of the state court affirmed. Rule 12 was promulgated by the Supreme Court to safeguard itself against inroads upon its time caused by a multitude of trivial and farfetched claims of denial of due process or other constitutional right. As we understand it, the proof of jurisdiction must establish not only that the case is one falling within the strict terms of Sec. 1257 of the Judicial Code but also that the question which it presents is a federal question of substance neither frivolous nor already settled.

In the present case it must be remembered that we are concerned with the enforcemnt of a city ordinance duly adopted and passed by the city council of the City of Omaha. This ordinance amended the former zone ordinance by changing the use to which a wide area west of the city limits could be put. The appellant wants to build a trailer camp in a part of this area and the amended zone ordinance requires that the property be used for residential purposes. Not a single witness was brought forth by the appellant to testify that his leased land could not be used for residential purposes. The owner of the land, from whom the appellant leases, is not a party to the suit and at no time has opposed the amended zone ordinance.

Thus, we are here concerned not with the validity of a state statute, but with the validity of a local municipal ordinance which both the trial court and the state supreme

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court have declared is valid and enforceable. True, the Supreme Court of the United States has declared that the word "statute" in the Judicial Code is used in a broad sense and includes a municipal ordinance, yet we submit that the interpretation of a local ordinance is not as important or substantial as the interpretation of a state statute. The very evil which Rule 12 was intended to prevent will certainly come to pass if every litigant who dislikes a local ordinance can take his case to the Supreme Court of the United States simply by alleging in general terms that the ordinance is unconstitutional.

As we have explained in the statement of facts, the appellant in his answer as first filed simply alleged that he had a nonconforming use and that, therefore, he could go ahead with his trailer camp even though the ordinance was valid. In other words, he contended that the ordinance could not operate retroactively. During the trial of the case, and after the plaintiff City had rested, the appellant amended his answer to allege that the ordinance was "unconstitutional as depriving this defendant of his property without just compensation." The trial court dismissed this contention with a single sentence (Transcript, page 43), and went on to consider the primary question of nonconforming use. This latter issue is purely one of state law—this is, it concerns the construction of the ordinance from the standpoint of whether or not it operates retroactively and what constitutes a nonconforming use. The trial court decided that the appellant did not have a nonconforming use for the reason that he had neither started construction of the trailer camp nor had he expended any substantial sum of money prior to the adoption of the new zone ordinance.

The Supreme Court of Nebraska considered the same two issues. It first discussed what it described as "appellant's primary contention" and ruled that appellant had not gained a nonconforming use. The Court then went on

to discuss the issue of constitutionality. It disposed of this by saying, in essence, that there was no evidence of unreasonableness and that, therefore, the ordinance was valid, since under Nebraska law an ordinance passed in the exercise of a city's police power is presumably valid unless the unreasonableness is shown by satisfactory evidence. No federal cases were cited.

The rule is well established that under its police power a municipality may enact reasonable regulations governing the use to which real property may be put. It is this rule which is the foundation of the zoning system of the modern American municipality. The Supreme Court of the United States long ago upheld the broad principle that such exercise of the police power is valid under the federal constitution. The leading case on this point is *Euclid* v. *Ambler Realty Co.*, 272 U. S. 365, 71 L. Ed. 303, 47 S. Ct. 114. The only problem that remains, therefore, is whether under the particular facts and circumstances of each case the zoning ordinance being challenged is fair and reasonable. Appellees submit that this is primarily a question of fact, and that in the present case the Supreme Court of Nebraska has resolved this fact question in favor of the validity of the ordinance. The rule has often been stated that ordinarily a state court's findings of fact and its rulings on discretionary matters are conclusive on the Supreme Court.

Thus we have a situation where the appellant claims a right of review simply because he has made a general claim of unconstitutionality. Appellees submit that this asserted right is so wanting in foundation and is so unsubstantial as to be devoid of all merit and frivolous. In *Zucht* v. *King*, 43 S. Ct. 24, 260 U. S. 174, 67 L. Ed. 194, the Supreme Court said:

> "But, although the validity of a law was formally drawn in question, it is our duty to decline jurisdiction whenever it appears that the constitutional question

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presented is not, and was not, at the time of granting the writ, substantial in character. Sugarman v. United States, 249 U. S. 182, 184, 63 L. Ed. 550, 551, 39 Sup. Ct. Rep. 191. * * *"

II

The appellees further submit that the appeal should be dismissed because the jurisdictional statement filed by the appellant does not meet the requirements of Rule 12, Section 1, of the Supreme Court Rules in the following respects:

(a) The jurisdictional statement not only does not "refer distinctly," but does not refer at all, "to the statutory provision believed to sustain the jurisdiction."

(b) The jurisdictional statement does not set out verbatim or appropriately summarize the pertinent provisions of the statute of the state (in this case a municipal ordinance) the validity of which is involved.

(c) The jurisdictional statement not only does not "refer distinctly", but does not refer at all, "to the date of judgment or decree sought to be reviewed and the date upon which the application for appeal is presented."

(d) The jurisdictional statement does not contain quotations from the record or references to the places in the record where the matter appears "as will support the assertion that the rulings of the court were of a nature to bring the case within the statutory provision believed to confer jurisdiction on" the Supreme Court of the United States.

(e) The applicant did not append to the jurisdictional statement a copy of the opinion rendered by the Supreme Court of Nebraska, reference to which is necessary to ascertain the grounds of the judgment or decree.

(f) The appellant has cited no cases to sustain the appellate jurisdiction of the Court.

WHEREFORE, the appellees move to dismiss the appeal of the appellant herein on the ground that the case presents no substantial federal question and on the further ground that the jurisdictional statement filed by the appellant does not meet the requirements of Rule 12, Section 1, and the appellees further move, if the motion to dismiss is not granted, that the decision of the Nebraska Supreme Court be affirmed on the ground that the federal questions, if any, upon which the decision of this cause depends are so unsubstantial as to need no further argument, all as appears in the foregoing Statement Opposing Jurisdiction filed herewith.

Respectfully submitted,

THE CITY OF OMAHA, a Municipal Corporation,

Appellee

By EDWARD F. FOGARTY,
EDWARD SKLENICKA,
JAMES M. PAXSON,
HERBERT FITLE,
Per EDWARD F. FOGARTY,

One of its Attorneys.

WEST HILLS IMPROVEMENT CLUB, a Corporation, and
NINETIETH STREET REALTY COMPANY, a Corporation,

Interveners-Appellees.

By SPIER & ELLICK,
ALFRED G. ELLICK,

Their Attorneys,
712 Farm Credit Building,
Omaha 2, Nebraska

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EXHIBIT "A"

ORDINANCE No. 15833

AN ORDINANCE TO AMEND ORDINANCE No. 15239 OF THE CITY OF OMAHA BY CHANGING THE BOUNDARIES OF THE DISTRICT MAP; AND REPEALING THAT PART OF ORDINANCE No. 15239 OF THE CITY OF OMAHA IN CONFLICT HEREWITH.

Be It Ordained by the City Council of the City of Omaha:

Section 1. That the District Map which is a part of Ordinance No. 15239 of the City of Omaha, be, and the same is hereby, changed and amended so that the area between Pacific Street on the south and Dodge Road on the north from 84th Street to 90th Street; the area between Pacific Street on the south and Dodge Road or Cass Street on the north of 93rd Street to 96th Street; and the area between Dodge Road or Cass Street on the south to Western Avenue, extended, on the north from 90th Street to 96th Street, be rezoned from 2nd Suburban District to the 1st Residence District.

Also, that area bounded by Dodge Road or Cass Street on the south and Western Avenue on the north and from 87th Street on the east to that tract now zoned 1st Residence District on the west, be rezoned from 2nd Suburban District to the 2nd Residence District.

Section 2. That all parts of Ordinance No. 15239 of the City of Omaha in conflict herewith be, and the same are hereby, repealed.

Section 3. That this ordinance shall take effect and be in force from and after fifteen days after its passage.

(S.) CHARLES W. LEEMAN,
Mayor and President of City Council.

Passed: Dec. 30, 1947. Attest:

(S.) M. J. DINEEN, JR.,
City Clerk.

Introduced By:
(S.) CARL W. JENSEN.

Approved As To Form:
(S.) EDWARD SKLENICKA,
City Solicitor.